

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 13-02

**LISA ANNE CORNELL and
G. WARE CORNELL, Jr.**

v.

**PRINCESS CRUISE LINES, LTD (CORP)
CARNIVAL plc
and CARNIVAL CORPORATION**

Claimants' Memorandum in Opposition to Respondents' Exceptions

G. Ware Cornell Jr.
Board Certified Civil Trial Lawyer
Cornell & Associates, P.A.
2645 Executive Park Drive
Weston, FL 33331
Tel: (954) 618-1041
Fax: (954) 944-1969
ware@warecornell.com
Fla. Bar No: 203920

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
INTRODUCTION	4
ARGUMENT	4
Exceptions Not Raised	4
First Exception	6
Second Exception	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES:

<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986)	9
<u>Foman v. Davis</u> , 371 U.S. 178 (1962)	10
<u>James Madison Ltd v. Ludwig</u> , 82 F.3d 1085 (D.C. Cir. 1996)	10
<u>South Carolina State Ports Auth. v. FMC</u> , 243 F.3d 165 (4th Cir. 2001)	4

RULES AND REGULATIONS:

46 C.F.R. §502.227	4
Fed. R. Civ. P. 59	4

Introduction

As the Fourth Circuit has famously observed about adjudicatory proceedings before the Federal Maritime Commission, “The proceeding thus walks, talks, and squawks very much like a lawsuit.” South Carolina State Ports Auth. v. FMC, 243 F.3d 165, 174 (4th Cir. 2001).

Exceptions Not Raised

46 C.F.R. § 502.227 requires the filing of exceptions to the initial decision. This the Respondents have done. However, the Commission should observe that the Respondents have not objected to most of the ALJ’s findings of fact and conclusions of law.

Rule 59 of the Federal Rules of Civil Procedure may be helpful to the Commission. It deals, among other things with the consequences of failing to timely object to the Report and Recommendations of Magistrate Judges as to both nondispositive and dispositive rulings:

RULE 59. MATTERS BEFORE A MAGISTRATE JUDGE

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is

contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

(1) Referral to Magistrate Judge. A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact. The clerk must immediately serve copies on all parties.

(2) Objections to Findings and Recommendations. Within 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

Rule 59(a) and (b), F.R.Civ.P (emphasis added)

Significantly the Respondents have clearly abandoned, among other things, their challenge to the jurisdiction of the Commission and all claims that the conduct for which they have contended resulted in their refusal to deal in violation of the Shipping Act was based on reasonable transportation-related course of conduct. Respondents do not challenge the ALJ's determination that each of eleven

(11) asserted justifications for refusing to deal are not supported. *See* Initial Decision p. 54.

Respondents devote their exceptions to only two (2) assertions.

First exception

Firstly, three (3) years after issuing orders to “ban the Cornells” on the basis of the now-abandoned claim that the Global Fine Art litigation justified a refusal to deal, the Respondents now seek leave to try and find out if there might be other any grounds that they could have issued the “ban the Cornells” directive.

In spite of the fact that exceptions are directed to the record before the ALJ, the Respondents have improperly sought to introduce new “facts” into their exceptions which were never presented below and never offered in any proceeding. The other big problem is, as they concede, they are speculating as to what they may uncover from their own crew and own records.

To dress up this improper injection of speculation into the exceptions by asserting certain events as “facts” is to deliberately seek to disadvantage Complainants and force them to go outside the record.

Should a remand be ordered by the Commission for Respondents to locate their own employees and query them about events on either a thirty-three (33) day cruise in 2009 or a fourteen (14) day cruise in the spring of 2010, it would uncover nothing. Any kind of misconduct which would threaten the safety of the passengers or crew or interfere with the navigation of the vessel would have

resulted in the creation of a massive and justified internal record upon which passengers could be denied boarding. The fact that the Respondents' exceptions themselves acknowledge that Princess does not have any such records is enough for the Commission to disallow this exception.¹

Even more astonishing is that the Respondents' argument that it can justify a refusal to deal whenever a passenger receives a refund or credit of any kind. Clearly the enforcement of such an assumed prerogative lies outside the penumbra of the Commission's jurisdiction. As the Respondents have repeatedly argued citing the FMC website, disputes about the terms and conditions of passage do not fall before the Commission. Consider the irony of this plea.

Clearly Respondents want to be able to selectively deny passage to those who make complaints about service, ports, accommodations, food, bed linen, laundry, portraiture, medical care, cleanliness, shore excursions, entertainment, weather, and hotel staff. Obviously, they do not refuse transportation to all such

¹The evidence Princess wishes to investigate arises out of concerns Lisa Cornell raised regarding the manner which disabled passengers were handled by the shore excursion team.

In particular, Lisa Cornell and her mother were boarding a bus when the shore excursion manager advised them that because the excursion was oversold, there was no room to accommodate her mother's wheelchair and that she either had to leave her chair behind or not participate.

The funds that were credited back to their account was not for the cruise, but for the ruined shore excursion. *See* Exhibit A attached.

As such this cannot possibly be a "transportation related" reason.

passengers because Respondents are in the hospitality industry as well as the navigation business. The Respondents would quickly run out of prospective customers if all were banned.

The problem for Respondents is that the Congress has said that common carriers cannot unreasonably refuse to deal. In an effort to nullify these statutory prescriptions the Respondents turn to the very type of issues that are clearly not matters a consumer could bring to the Commission. Put succinctly, if it is a matter outside the Commission's jurisdiction for cruise passengers it is also outside the jurisdiction for cruise lines.

The Commission should deny this exception.

Second Exception

The Respondents also claim to have been denied due process. In fact the Respondents were fully apprised of their responsibilities to deliver "any" evidence and argument which it contended would support an exception to the rule that it may not refuse to deal under the Shipping Act.

On April 17, 2013 the ALJ issued an Order to Supplement the Record. It required:

On or before April 29, 2013, Respondents are ordered to file the following:

1. A declaration or affidavit by an appropriate person or persons identifying the contracts relating to her cruises that Respondents allege Lisa Cornell has a proven record of disregarding, ignoring, and/or breaching, and the facts that support a finding that she disregarded,

ignored, and/or breached the contracts. Copies of the contracts must be attached to the declaration or affidavit.

2. A declaration or affidavit by an appropriate person or persons setting forth all other evidence on which Princess base their contention that Lisa Cornell "is someone who was extortionate, unethical, unreasonable, and whose character and conduct warranted banning [her] from sailing on Princess' ships," and attach any documentary evidence supporting the contention" (Docket Entry 14)

The "surprise" that the Respondents imply should have been no surprise at all. It was the Respondents who filed a motion for summary judgment instead of an answer and repeatedly insisted that discovery would not be necessary.

Clearly the ALJ's order should have put the Respondents on notice and in fact they asked for additional time to respond. As the Supreme Court has held:

Given that "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence."

Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

All that was required is for the the ALJ to tell the Respondents to put forward all of their evidence. Respondents did just that. It submitted a voluminous and vituperative response which was summarized by the ALJ into eleven separate justifications, any one of which might have sustained its burden. *See* Initial Decision page 59.

As the ALJ noted, "Princess is in control of the information concerning reasons for barring Lisa Cornell from its ships." Initial Decision page 54. As

Respondents now implicitly acknowledge by failing to make an exception to the finding, those eleven reasons were insufficient.

Even if the commission were to remand, the evidence sought still would not be sufficient. Courts have long recognized that the right to amend does not apply when the amendment to be asserted would be futile.

A court may deny a motion to amend if it finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). A motion to amend a complaint is futile "if the proposed claim would not survive a motion to dismiss." James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1099 (D.C. Cir. 1996).

Furthermore the time to have sufficient cause is not during a lawsuit, but rather when the action is taken.

Conclusion

The Respondents exceptions are without merit and should be denied.

Respectfully submitted,

CORNELL & ASSOCIATES, P.A.

BY: 
G. WARE CORNELL JR.

ware@warecornell.com

Fla. Bar No: 203920

2645 Executive Park Drive
Weston, FL 33331
Phone: (954) 618-1041
Fax: (954) 944-1969
Attorneys for the Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Electronic and U.S. Mail to Steve Holman, Esq., Maltzman & Partners P.A., 55 Miracle Mile, Suite 320, Coral Gables, FL 33134, steveh@maltzmanpartners.com, this September 3, 2013.

BY: 

G. WARE CORNELL JR.

Exhibit A



MV Grand Princess
Saturday, December 19, 2009

Mrs. Cornell & Mrs. McGillivray
Stateroom – D732

Dear Mrs. Cornell & Mrs. McGillivray,

Firstly we would like to acknowledge your comments during voyage A928 onboard the *Grand Princess* regarding the difficulties encountered with your Shore excursions and the accessibility for disabled passengers on the excursions.

In view of this, a goodwill credit has been placed onto your account to the value of the excursions in Barbados totaling \$118.00

Your comments have been forwarded to both shipboard and shore side management for their review and we appreciate any comments both positive and negative in order to give us the opportunity to provide the best possible service to our passengers.

We understand that you were disappointed with some aspects of your cruise and would like to apologise for the inconvenience caused to you.

Please be advised that all details pertaining to this will be forwarded to our Customer Relations Department for their review. As course of redress you may contact Princess Cruises in writing upon your return home at the following address:

Customer Relations,
Princess Cruises,
24305 Town Center Drive,
Santa Clarita,
CA 91355-4999

Tel: 1-800-421-1700 ext 44420 Email: customerrelations@princesscruises.com

We sincerely hope that in spite of this situation you enjoyed your time onboard with us.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Tony Arvidson".

Tony Arvidson
First Purser Administration
MV Grand Princess